

**DEPARTMENT OF FOOD AND AGRICULTURE**

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A.G. KAWAMURA, Secretary



August 23, 2005

Mr. Robert Schneider  
Chairman  
Regional Water Quality Control Board, Central Valley Region  
11020 Sun Center Drive,  
Rancho Cordova, CA

Dear Mr. Schneider:

Thank you for the opportunity to comment on your proposed revisions to the Irrigated Lands Conditional Waiver from Waste Discharge Requirements (WDR) in accordance with the Sacramento Superior Court ruling in Case Number 04CS00264.

General Comments

In the subject case, the court called into the question the so-called "Tributary Rule" and its application to water bodies whose flows are dominated by agricultural flows. In specific, the court asks what beneficial uses apply to these water bodies? This question arises from the challenge brought about by the California Farm Bureau Federation (CFBF) to the application of water quality objectives to water bodies for which uses have not been assessed and for which it would be improper to apply the "Tributary Rule." The ensuing discussing in the court ruling highlights the differences between agricultural dominated water bodies and natural water bodies. The court cites several RWQCB reports that acknowledge these differences and the need to conduct water quality planning to appropriately designate uses. In fact, the record is much more extensive than noted in the ruling. There were several white and issue papers authored by the State Water Resources Control Board (SWRCB) and RWQCBs that preceded the now defunct Inland Surface Water Plan (ISWP) (1991) that dealt with regulatory options for agricultural drains and agricultural dominated water bodies. The ISWP appropriately and boldly dealt with the uniqueness of California hydrology (e.g. Category a, b, and c water bodies) including agricultural dominated water bodies (see Chronology, Attachment).

Prior to the rescission of the ISWP, great progress had been made to resolving issue of objection by the USEPA in relation to performance goals proposals for agricultural dominated water bodies in the ISWP. Unfortunately, for unrelated reasons, the Sacramento Superior Court declared ISWP in violation of state law and the SWRCB rescinded the ISWP as instructed by the court. Following the rescission and as a result of related settlement discussions, the SWRCB convened a stakeholder process to

develop recommendations to the SWRCB on a number of issues for the revision to the ISWP, including water bodies dominated by agricultural flows. These recommendations mirrored the framework that was developed in the ISWP. It is interesting to note that among the participating stakeholders were the USEPA, and the RWQCB. Shortly thereafter, the USEPA and RWQCB staff entered into discussions with the California Rice Industry Association regarding the appropriate beneficial uses for agricultural dominated channels in rice production. During these discussions, the USEPA endorsed the recommendations of the ISWP stakeholder group. It also endorsed the Use Attainability Analysis (UAA) for the wetland channels of the Grassland area as a model by which to conduct UAA for a group of similar water bodies.

Now the RWQCB has embarked on regulation of agriculture in a major way, including irrigated lands, confined animals, and food processors. Yet despite the recognition of the major differences between agricultural dominated water bodies and natural water bodies, no progress has been made toward conducting the basic water quality planning to appropriately regulate these types of water bodies. The RWQCB response to the court remand fails to capture this opportunity to change this direction.

We note four major issues with the proposed revisions to the Irrigated Lands Waiver:

1. The application of the "Tributary Rule" to tributary streams in designating beneficial uses, in specific to agricultural dominated streams,
2. The blanket application of Federal Clean Water Act Section 101(a)(2) uses (the goal of the CWA for the protection of and propagation of fish, shellfish, and wildlife and recreation in and out of the water) to constructed and modified agricultural water bodies,
3. Clarification of which Receiving Water Limitations are connected to a specific beneficial use,
4. Application of Attachment A water quality objectives to agricultural dominated water bodies.

#### Tributary Rule

In Attachment A2, the RWQCB notes that by virtue of the "Tributary Rule" beneficial uses are ascribed to agriculturally dominated streams but not to constructed channels. This process will assume inappropriate uses to agricultural dominated streams. The result of this process will be unnecessary expense and effort on the part of the agricultural industry in California to meet water quality objectives for beneficial uses that are inappropriate. Consider for example, cold-water migration, which is an identified existing use of the main stem of the San Joaquin River and cold-water spawning which is designated as a potential use. These uses may be appropriate for a pristine San Joaquin River but not in its current state. In fact, the California Department of Fish and Game operates a fish barrier at the confluence of the San Joaquin River with the Merced River to prevent migration of Salmon into the San Joaquin River upstream of the Merced River.

Regardless of the potential for cold-water migration and spawning in the San Joaquin River, tributaries of the San Joaquin River do not have those uses and certainly not the agricultural dominated streams. These uses do not exist now or in the past. Migration and spawning into San Joaquin River tributaries are unproductive. This was recognized by the RWQCB in its UAA of Mud Slough (n) (a tributary of the San Joaquin River) in which the RWQCB de-designated those uses. In fact, as part of mitigation measures identified in the functionally equivalent document, there was commitment to operate the fish barrier at the Merced River to ensure that unproductive migration would not occur into Mud Slough (n).

The beneficial uses of the San Joaquin River should not be ascribed *a priori* to tributary streams. The water quality characteristics of eastside streams, even in its pristine state are dissimilar to the San Joaquin River. The eastside tributaries drain marine sedimentary deposits, for example. The historic names of some of these tributaries Mud and Salt Slough) give an indication of these differences.

#### CWA Section 102(a)(2)

Section 102(a)(2) of the CWA lays out the objectives of the CWA which are to wherever attainable, achieve a level of water quality that provides for the protection and propagation of aquatic life, and wildlife, and recreation in and on the water. These are the so-called fishable/swimmable provisions. The RWQCB intends to then designate aquatic life uses and recreation (REC 1 and 2) to all agricultural dominated water bodies whether constructed or natural. In essence this is a declaration that all agricultural water bodies are waters of the United States. However, in the ISWP process and the dialogue that followed, it was noted even by the USEPA that all agricultural water bodies might not be waters of the United States. Thus, it is inappropriate to ascribe *a priori* these uses to all agricultural water bodies.

Furthermore, it is recognized that even if the agricultural dominated water body is a water of the United States, the Section 102(a)(2) uses may not necessarily apply. For these reasons, regulations were developed that provide a process for removing these uses where not appropriate (40CFR Part 131.10). This is the UAA process.

During the ISWP process and the dialogue that followed, it was recognized that some constructed channels might have only incidental and limited aquatic life uses. It was suggested that these channels only be required to provide for no acute toxicity. Thus, it would be inappropriate to assume Section 101(a)(2) beneficial uses for all agricultural dominated water bodies.

#### Receiving Water Limitations

It was noted in Attachment A2, "some of the Receiving Water Limitations explicitly refer to adverse impacts to beneficial uses. Those Receiving Water Limitations require a determination of the beneficial uses for the applicable receiving water bodies." This is in reference to the water quality objectives listed in Attachment A, which restates some of the water quality objectives in the Basin Plans. Attachment A further notes that this list is not comprehensive. A review of the water quality objectives listed in Attachment A

that do not include a statement regarding adverse affects on beneficial uses leaves only toxicity and turbidity. Beyond these two objectives, what water quality objectives is the RWQCB holding agricultural discharges responsible for and on what basis?

#### Attachment A

The RWQCB purports to require agriculture to comply with Attachment A water quality objectives and potentially other water quality objectives for which it is yet to define. These generic water quality objectives along with the list in the Basin Plan are to protect general surface water quality. However, it is recognized that agricultural dominated water bodies are different in character from most surface waters and have limited beneficial uses. This is because they are not natural streams and thus do not have the physical or chemical characteristics necessary to support recognized beneficial uses. Thus, it is inappropriate to ascribe these water quality objectives to all agricultural dominated water bodies.

The RWQCB is at a crossroads with respect to regulating agriculture. Basic water quality planning is fundamental to this process. Beyond that, the uniqueness and differences of agricultural dominated water bodies from natural stream dictates that traditional reliance on alternatives to basin planning (e.g. the "Tributary Rule" and a *priori* designation of beneficial uses) is not appropriate. The consequences to agriculture are unnecessary and unreasonable costs in trying to meet these uses.

The groundwork has been laid in the development of a policy for the regulation of water bodies dominated by agricultural flows. We urge you to revive this process and we offer our assistance to that end.

Sincerely,

#### **Original Signed By**

Steven Shaffer  
Director, Office of Agriculture and Environmental Stewardship

cc: Art Bagget, SWRCB  
Celeste Cantu, SWRCB  
Dan Merkley, SWRCB  
Tom Pinkos, RWQCB  
James Branham, CalEPA

## **Attachment - Chronology of Events Related to Regulation of Agriculture Dominated Water Bodies**

**April 11, 1991** - SWRCB adopts ISWP

**November 6, 1991** – Disapproval of performance goals for Category (a), (b), and (c) water bodies (reclaimed water dependent, ephemeral streams, and agricultural dominated).

**March 1994** – Judgment from Sacramento Superior Court, ISWP adopted in violation of state law. Orders the SWRCB to rescind.

**October 1995** – In accordance for settlement with litigants' attorney fees, the SWRCB agrees to a facilitated public advisory task force process for issues relevant to the development of new ISWP. The Public Advisory Task Force, including "Agricultural Waters Task Force" submits their recommendations to the SWRCB.

**September 1996** – Rice industry, the USEPA, SWRCB, and RWQCB enter into dialogue regarding regulation of agricultural dominated water bodies.

**March 2000** – The SWRCB adopts a State Implementation Plan (SIP), which implements criteria for toxic pollutants contained in the California Toxics Rule.

**April 28, 2000** – In the absence of an ISWP consistent with federal regulations for toxic pollutants, the USEPA promulgates the California Toxics Rule.

**July 2003** – RWQCB adopts conditional waiver for Irrigated Lands but fails to define beneficial uses for the various categories of agricultural dominated water bodies.

**April 28, 2005** – Sacramento Superior Court calls into question the beneficial uses